

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Revision of Part 22 and Part 90 of the)	WT Docket No. 96-18
Commission's Rules To Facilitate Future)	
Development of Paging Systems)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive Bidding)	

**THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR PARTIAL RECONSIDERATION**

The Personal Communications Industry Association ("PCIA"), by its attorneys, hereby petitions the Commission for partial reconsideration of the *First Report and Order* in the above-captioned docket.¹ The *First Report and Order* modified the freeze adopted by the Commission in the *Notice of Proposed Rule Making* in this proceeding² on the acceptance and processing of applications for paging authorizations under Parts 22 and 90 of the Commission's Rules. While the *First Report and Order* has given paging licensees important flexibility in expanding their systems and providing competitive service to subscribers, PCIA believes that two additional steps would further improve the action taken by the Commission in the *First Report and Order*. First, the Commission should grant nationwide exclusivity to all licensees that had qualified for nationwide exclusivity, that had completed construction of

¹ FCC 96-183 (Apr. 23, 1996) ("*First Report and Order*"). A summary of the *First Report and Order* was published in the Federal Register on May 10, 1996, 61 Fed. Reg. 21380.

² FCC 96-52 (Feb. 9, 1996) (Notice of Proposed Rule Making) ("*Notice*").

facilities by February 8, 1996, or had valid outstanding construction permits as of that date, and that otherwise are in compliance with the applicable Commission rules. *Second*, the Commission should permit existing licensees to file modification applications that involve locating a facility within 40 miles of any authorized facility, so long as the application underlying that authorization was filed in advance of the February 8, 1996 *Notice* adoption date.

I. BACKGROUND

PCIA commends the Commission for the action taken in the *First Report and Order* to enhance the ability of paging service providers to make necessary modifications to their systems and to expand their operations in pursuit of meeting the service needs of the public. The *First Report and Order* indicates that the Commission understood and responded to the concerns of the members of a highly competitive industry that saw that competition as well as their ability effectively to provide service threatened by an indefinite freeze on the filing of most applications during the pendency of the market area licensing rulemaking. At the same time, PCIA reiterates its support for the Commission's publicly stated intention to complete this proceeding as quickly as possible and promptly to begin the auctions. The interim licensing policies adopted in the *First Report and Order*, while a significant improvement over the terms of the freeze as originally adopted in the *Notice*, will not provide the necessary flexibility should the modified freeze remain in place for an extended period of time.

II. NATIONWIDE EXCLUSIVITY SHOULD BE GRANTED TO ALL ELIGIBLE AND FULLY COMPLIANT ENTITIES, NOT JUST THOSE WHO HAD COMPLETED CONSTRUCTION AS OF FEBRUARY 8, 1996

In the *Notice*, the Commission indicated that "all PCP channels for which licensees have *met* the construction requirements for nationwide exclusivity as of the adoption date of this *Notice*"³ would be granted the rights and benefits of a nationwide exclusive license.⁴

The Public Notice listing the licensees awarded nationwide exclusivity reaffirmed that licensees were required to have *completed* construction by February 8, 1996 -- regardless of the status of authorized construction periods -- in order to obtain the nationwide protection.⁵

In commenting on the interim licensing proposals, PCIA specifically urged the Commission to clarify that "929 MHz exclusive frequency licensees with time remaining on their exclusivity construction period (as specified in Section 90.495 of the Commission's Rules) may complete system build out and retain their exclusive license."⁶ The *First Report*

³ *Id.*, ¶ 26 (emphasis added).

⁴ The grant of nationwide exclusivity to a 929 MHz licensee is significant in at least two respects. *First*, the holders of nationwide exclusive licenses on messaging channels are permitted to file applications for additional sites without restriction during the pendency of the partial freeze on paging applications. *Second*, the Commission has proposed to exclude from market area licensing those channels on which nationwide exclusivity has been granted to a licensee. *Id.*, ¶ 26.

⁵ FCC Public Notice, *Wireless Telecommunications Bureau Announces 929-930 MHz Paging Licensees That Have Met Construction Requirements for Nationwide Exclusivity*, DA 96-748 (May 10, 1996) ("*Nationwide Exclusivity PN*").

⁶ Reply Comments of the Personal Communications Industry Association on Interim Licensing Procedures, WT Dkt. No. 96-18, at 15 (filed Mar. 11, 1996). PCIA notes that this concern is relevant to local and regional licensees as well as nationwide licensees.

and Order neither discussed this concern nor adopted the relief sought by PCIA and other parties.

PCIA urges the Commission to reconsider its position and instead clarify that nationwide exclusivity is granted to all licensees that had qualified as a nationwide exclusive licensee as of the February 8, 1996 adoption date of the *Paging Market Area Licensing NPRM* so long as that licensee completes construction of the necessary number of facilities within the authorized construction period and otherwise is in compliance with applicable rules.⁷ Thus, even if a licensee had not completed construction of the minimum 300 transmitters required by Section 90.495(a)(3) of the Commission's Rules as of February 8, 1996, but that licensee still had time left on applicable construction permits, the licensee should be granted nationwide exclusivity and should have the opportunity to continue to add new sites during the paging application freeze (consistent with the Commission's policies).

This action would more effectively carry out the Commission's Part 90 exclusivity rules, ensure compliance with the procedural requirements of the Communications Act, and serve the public interest.⁸ Initially, Section 90.495(c) indicates that:

⁷ This condition would include the requirement imposed by the Commission that the authorized construction period would remain tied to the original licensing date "even if subsequent license modifications are granted." *Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 8318, 8326 (1993).

⁸ TSR Paging Inc. and PageMart II, Inc. have specifically sought reconsideration of the Commission's action to the extent each company was excluded from listing on the *Nationwide Exclusivity PN*. See TSR Paging Inc. Emergency Petition for Reconsideration (filed May 6, 1996), Supplement (filed May 14, 1996), Second Supplement (filed May 23, 1996); PageMart II, Inc. Petition for Reconsideration (filed June 5, 1996).

A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section *at the time of initial licensing*. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.⁹

Thus, the Commission's own rules indicate that licensees are granted nationwide exclusivity at the time the initial authorizations are granted, subject to revocation if the applicable requirements are not met. On that basis, any conclusion by the Commission to reaffirm the nationwide exclusivity of only those licensees that had completed construction as of February 8, 1996, is inconsistent with the pre-existing rules and the reasonable expectations of the Commission's licensees.

Denying exclusivity to licensees qualified for nationwide exclusivity and with additional construction time available to complete system buildout not only contravenes the Commission's own rules without required rulemaking proceedings, it also appears to constitute a modification of a license that would require the conduct of procedures prescribed under Section 316 of the Communications Act. To date, the Commission has not explained why the public interest would be served by treating licensees in the midst of authorized nationwide system buildout (based on reasonable reliance on the Commission's licensing rules and policies) differently from those licensees who happened to have completed construction as of February 8, 1996. Moreover, the Commission has not provided the required notice of

⁹ 47 C.F.R. § 90.495(c) (emphasis added). Under Section 90.496, a licensee may obtain an extended construction period beyond eight months, but not to exceed three years. 47 C.F.R. § 90.496. In any event, as discussed above, the construction period is tied to the original licensing date, and may not be extended merely by seeking modification of the unconstructed authorization.

proposed action to the licensees involved, or afforded the procedural rights specified by Section 316.

Indeed, there appears to be no valid public interest justification for drawing a distinction between constructed nationwide systems and those still underway pursuant to valid Commission authorizations. The excluded licensees have reasonably relied upon their authorizations as well as Commission policies articulated in the rules and pursuant to rulemaking procedures, and likely have invested substantial sums in order to fulfill their obligations under the authorizations. Nonetheless, the ability of such licensees to meet customer needs consistent with business plans based on the Commission's rules and policies is now thwarted, adversely affecting the subscribers to such services as well as competition in the messaging marketplace.

The Commission thus should immediately revise the *First Report and Order* and the *Nationwide Exclusivity PN* and extend nationwide exclusivity to those licensees that are qualified and are still constructing facilities pursuant to valid construction authorizations, so long as such licensees otherwise are in full compliance with Commission rules and policies. PCIA urges the Commission to act promptly in order to provide certainty to the licensees affected by this issue. Such action will be most equitable and will most effectively serve the public interest.

III. THE COMMISSION SHOULD PERMIT MODIFICATION OF AUTHORIZATIONS DURING THE MODIFIED FREEZE PERIOD MEASURED FROM ANY AUTHORIZED FACILITIES FOR WHICH APPLICATIONS WERE PENDING AS OF FEBRUARY 8, 1996

Under the *First Report and Order*, an licensee may seek authorization for additional or modified transmitter facilities if:

(1) the applicant is an incumbent paging licensee on a non-nationwide CCP channel or an incumbent paging licensee who has earned local or regional exclusivity on a PCP channel; and (2) the applicant certifies that the proposed site is within 65 kilometers (40 miles) of an authorized transmission site that was licensed to the same applicant on the same channel on or before February 8, 1996, and which is operational as of the date the application for the additional transmitter site is filed.¹⁰

Similar relief was granted in the shared frequencies.¹¹ The Commission explained that it was imposing the condition that the facility be licensed as of the adoption date of the *Notice* "to ensure that expansion is limited to the periphery of existing service areas and to discourage additional expansion by 'leap-frogging' of new sites."¹²

PCIA urges the Commission to reconsider this action, and instead allow expansion from a facility authorized at the time a new modification application is filed regardless of when the facility was authorized by the Commission as long as the underlying application was *filed* with the Commission as of February 8, 1996. In its comments on the interim

¹⁰ *First Report and Order*, ¶ 26.

¹¹ *Id.*, ¶¶ 30, 32.

¹² *Id.*, ¶ 26.

licensing proposals, PCIA spoke of expansion within 40 miles of the "existing composite license area[],"¹³ referring to the authorized area at the time of the submission of the new or modification application.

Adoption of this approach is more equitable while still satisfying the Commission's concerns about leaf-frogging. As the Commission is well aware, it had a tremendous backlog of applications involving operations on 931 MHz frequencies. This backlog resulted from the number of applications being filed, mutual exclusivity chains, and limited staff resources necessary to review and act on applications. PCIA and its members have worked with the Commission staff in refining the necessary computer algorithm and updating the Commission's records. That effort began to show results just before the date of adoption of the *Notice*, with many of the 931 MHz applications for 1995 and earlier having been processed and authorizations issued subsequent to the *Notice* adoption date. Despite the fact that these applications were filed long before the Commission imposed a freeze and proposed to adopt market area licensing rules, 931 MHz licensees are, for purposes of filing applications during the partial freeze period, locked into system boundaries that may well be superseded by more recent grants.

Clearly, the grant of pending 931 MHz (and other) applications will affect the needs of licensees with respect to system design and the provision of service to the public. It seems highly inequitable to require that facilities have been authorized as of February 8, 1996, when the 931 MHz applicants had no control over the delays in application processing.

¹³ Comments of the Personal Communications Industry Association on Interim Licensing Procedures, WT Dkt. No. 96-18, at 32 (filed Mar. 1, 1996).

Indeed, such applicants are being punished for the timing of Commission processes over which they have no control.

Similar treatment should be extended to licensees in other paging bands as well. There is no basis for treating the 931 MHz licensees differently from licensees on other Part 22 and Part 90 frequencies who had applications pending with the Commission on February 8, 1996.

A more appropriate approach would be to use authorized facilities as the basis for determining where existing licensees may expand, but require only that the underlying application have been filed with the Commission by February 8, 1996. This approach would recognize that the adoption of the freeze was essentially an arbitrary date. Moreover, adopting this standard would still address the Commission's concerns about "leap-frogging," since licensees could file expansion applications based on authorized facilities that reflected only proposals made to the Commission prior to February 8, 1996. This standard thus most effectively serves the public interest by balancing considerations of equity with the Commission's policy goals.

IV. CONCLUSION

For the reasons state above, the Commission should further modify its partial freeze on the filing and processing of paging applications to recognize all eligible nationwide exclusive licensees regardless of their date of construction and permit the filing of expansion

applications measured from authorized facilities for which the underlying application was submitted to the Commission as of February 8, 1996.

Respectfully submitted,

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